STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2008
v	No. 274005 Ingham Circuit Court
RALPH WARREN LEWIS, Defendant-Appellant.	LC No. 05-001401-FH

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2). He was sentenced as a second habitual offender, MCL 769.10, to a prison term of 13 to 22 ½ years. Defendant appeals as of right. We affirm.

Defendant first argues that his constitutional right to confrontation was violated when hearsay statements from the complainant were elicited from a nurse and a physician who examined the complainant while he was in the emergency room. Both the nurse and physician testified that upon questioning the complainant regarding what had happened, he told them that defendant had hit him. The complainant did not testify at trial. Defendant argues that these violations affected his substantial rights, requiring reversal. We disagree. An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if plain error prejudices the defendant and seriously affects the fairness, integrity, or public reputation of the judicial proceedings or results in the conviction of an actually innocent defendant. *Id.* at 763.

In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the high Court held that an out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause, US Const, Am VI, unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness.

At issue here is whether the out-of-court statements were testimonial in nature. In *Crawford, supra* at 51-52, the United States Supreme Court discussed the nature of confrontation rights and the issue of whether a statement is testimonial in nature:

> An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to

> the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.
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> The test of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused – in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
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> Various formulations of this core class of "testimonial" statements exist: *"ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[.] . . . Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. [Omission and emphasis in original; citations omitted.]

In *Davis v Washington*, 547 US 813; 126 S Ct 2266, 2273-2274; 165 L Ed 2d 224 (2006), the Court provided further guidance on the distinction between testimonial and nontestimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court noted, however, that statements made absent an interrogation were not necessarily nontestimonial. *Id.* at 2274 n 1. Ultimately, regardless of whether there is an interrogation, it is the declarant's statements, not the interrogator's questions, which must be evaluated to determine whether there is a Confrontation Clause concern. *Id.* In *Davis*, the Court concluded that 911 operators acted as agents of the police. *Id.* at 2274 n 2.

We hold that the testimony elicited from the examining nurse regarding the statement by the complainant was properly admitted at trial because the statement was not testimonial in nature under the guidelines offered in *Crawford* and *Davis.* The statement was not a solemn declaration or affirmation made to establish or prove some fact, the four-year-old declarant did not reasonably expect the statement to be used in a prosecution, the statement was not the functional equivalent of *ex parte* in-court testimony, there is no indication that the nurse was acting on behalf of the police or questioning the child in an effort to obtain information to be

used in a prosecution, and the primary purpose of her questioning was to address the child's injuries in the context of providing appropriate medical treatment.

With respect to the examining physician, the issue is not quite as clear cut. Although, as noted above, the statement was not a solemn declaration or affirmation made to establish or prove some fact, nor did the four-year-old declarant reasonably expect the statement to be used in a prosecution, the doctor did testify regarding her awareness that child abuse matters often end up in court and that accurate documentation was thus vitally important. However, the comments by the physician regarding possible future criminal prosecutions were made only in the context of explaining why she prepared such detailed documentation regarding injuries that suggest child abuse, and the nature and description of the complainant's extensive injuries do not give rise to the hearsay argument presented by defendant. On the other hand, the complainant's statement that defendant struck him, which does form the basis of the hearsay argument, was simply made in the context of the physician asking what happened for purposes of taking a medical history of the child, which was standard procedure. Therefore, the particular question posed by the physician that elicited the challenged statement from the victim was not related to the physician's remarks about court cases and documentation, nor was it posed with an eye to assist a possible future criminal prosecution. See *People v Geno*, 261 Mich App 624, 631; 683 NW2d 687 (2004) (child's statement to director of a children's center that the defendant hurt her in vaginal area in criminal sexual conduct case was nontestimonial in nature). We find no plain error.

Moreover, assuming error, it was not prejudicial, and the integrity of the proceedings were not compromised, nor is defendant actually innocent. There was overwhelming evidence of defendant's guilt aside from the challenged testimony.[1]

Defendant next challenges comments made during the prosecutor's closing argument, contending that they were an improper appeal for the jury to sympathize with the complainant. This asserted error was also not properly preserved by a timely objection and thus is reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Generally, appeals to the jury to sympathize with the victim are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, a prosecutor is free to argue all reasonable inferences arising from the evidence as related to his or her theory of the case and is given "wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Thus, a prosecutor may address subject matter that might arouse the jury's sympathy when arguing the evidence and its reasonable inferences in relation to his or her theory of the case.

[1] We also reject defendant's undeveloped and cursory argument that the prosecution failed to show that the complainant, only five years old when the trial took place and four when the crime occurred, was "unavailable." And again, assuming error, it was not prejudicial.

Viewing the prosecutor's remarks in context, it is plain that the prosecutor referenced the investigating officer's emotional testimony not to arouse the jury's sympathy but to address the severity of the injuries the complainant incurred. While the prosecutor's remarks may have evoked sympathy for the victim, the sympathy was likely derived from the unfortunate situation that the complainant endured rather than any improper effort by the prosecutor. Consequently, no plain error occurred, nor was defendant prejudiced.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio